

REMARKS

Claims 1-9, 12-22, 25-35, 38, and 39 are currently pending, with claims 1, 14, and 27 being independent. Applicants traverse the rejections set forth in the Final Office Action¹, wherein the Examiner: rejected claims 27-35, 38, and 39 under 35 U.S.C. § 101 and rejected claims 1-9, 12-22, 25-35, 38, and 39 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,751,190 B1 to Swallow ("Swallow") in view of U.S. Patent No. 7,000,121 B2 to Jarosz ("Jarosz").

II. The Rejection of Claims 27-35, 38, and 39 under 35 U.S.C. §101

The Examiner rejected claims 27-35, 38, and 39 under 35 U.S.C. §101 alleging that the claims are directed to "a computer-readable device/carrier wave that includes data signals." Office Action at 4-5. Applicants respectfully disagree. The Specification for the current invention describes that,

although embodiments of the present invention have been described as being associated with data stored in memory and other storage mediums, one skilled in the art will appreciate that these aspects can also be stored on or read from other types of computer-readable media, such as secondary storage devices, like hard disks, floppy disks, or a CD-ROM, a carrier wave from the Internet, or other forms of RAM or ROM.

Specification at ¶ 045. Therefore, the Specification describes "computer-readable media" which can include "storage devices," "a carrier wave from the internet, or other forms of RAM or ROM." *Id.* Examples of the described "storage devices" include hard-disks, floppy disks, or a CD-ROM, but do not include a carrier wave from the internet. Therefore, because independent claim 27 is directed to a "computer-readable storage

¹ The Office Action contains statements characterizing the related art and the claims. Regardless of whether any such statements are specifically identified herein, Applicants decline to automatically subscribe to any statements in the Office Action.

device,” it does not include a carrier wave. Thus, claim 27 falls squarely within the ambit of § 101. Accordingly, Applicant respectfully requests reconsideration and withdrawal of the § 101 rejection of independent claim 27. Moreover, because claims 28-35, 38, and 39, are dependent upon independent claim 27, and were rejected under the same rationale as claim 27, Applicant respectfully requests reconsideration and withdrawal of the § 101 rejection of these claims for at least the same reasons as listed above for claim 27.

III. The Rejection of Claims 1-9, 12-22, 25-35, 38, and 39 under 35 U.S.C. §103(a) Based on Swallow and Jarosz

The Examiner rejected claims 1-9, 12-22, 25-35, 38, and 39 under 35 U.S.C. § 103(a) as being unpatentable over Swallow in view of Jarosz. Applicant respectfully traverses the rejection.

Applicant respectfully submits that the § 103(a) rejection of claims 1-9, 12-22, 25-35, 38, and 39 was improper because the Examiner failed to ascertain the differences between the claimed inventions and the prior art and resolve the level of ordinary skill in the pertinent art, as required by *Graham v. John Deere Co.* and M.P.E.P. § 2141. Instead, the Examiner merely stated what the cited references purportedly teach and that it would have been obvious to a person having ordinary skill in the art to modify the method disclosed by Swallow to include alleged teachings of Jarosz without resolving the level of ordinary skill in the art. Office Action at 6.

Furthermore, even if the *Graham* factual inquiries had been resolved, a *prima facie* case of obviousness has not been established with respect to claims 1-9, 12-22, 25-35, 38, and 39. For example, independent claim 1 recites, among other things “[a]

network connecting a first gateway and a second gateway, the first gateway comprising a first node and a third node, the second gateway comprising a second node and a fourth node,” “transmitting over the network an indication from the first node to the second node that the third node has failed,” and “reconfiguring a first data, the first data initially configured to be transmitted over the network between the second node and the third node, to be transmitted over the network between the fourth node and the first node after the indication has been received by the second node.” Swallow and Jaros, taken alone or in combination, fail to teach or suggest the recited elements.

In the Final Office Action, the Examiner introduced a new rejection by refusing to give patentable weight to the features recited in the preamble of the independent claims. In the Office Action, the Examiner asserted for the first time that “[a] preamble is generally not accorded any patentable weight where it merely recites the purpose of a process or the intended use of a structure, and where the body of the claim does not depend on the preamble for completeness but, instead, the process steps or structural limitations are able to stand alone.” Office Action at 3.

However, as discussed below, because the body of claim 1 “depend[s] on the preamble for completeness,” Applicants request that the Examiner give the preamble of claim 1 proper patentable weight when reviewing the claim. Applicants remind the Examiner that “[t]he determination of whether a preamble limits a claim is made on a case-by-case basis in light of the facts in each case; there is no litmus test defining when a preamble limits the scope of a claim.” M.P.E.P. § 2111.02. Moreover, “[i]f the claim preamble, when read in the context of the entire claim, recites limitations of the

claim, or, if the claim preamble is 'necessary to give life, meaning, and vitality' to the claim, the claim preamble should be construed as if in the balance of the claim."

M.P.E.P. § 2111.02(I).

Among other things, the preamble to claim 1 recites a "[a] method for redirecting data in a network, the network connecting a first gateway and a second gateway, the first gateway comprising a first node and a third node, the second gateway comprising a second node and a fourth node." The body of the claim recites "transmitting over the network an indication from the first node to the second node that the third node has failed; and reconfiguring a first data, the first data initially configured to be transmitted over the network between the second node and the third node, to be transmitted over the network between the fourth node and the first node after the indication has been received by the second node." The first node, second node, third node, and fourth node referred to in the body of the claim are components of the first gateway and second gateway, as recited in the preamble. Further, the body of the claim recites "transmitting over the network" described in the preamble. Therefore, the body of claim 1 depends on the preamble for completeness. Accordingly, the preamble of claim 1 gives "life, meaning, and vitality" to the claim and should be attributed patentable weight, as required by the case law and the M.P.E.P. See M.P.E.P. § 2111.02; *see also, Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1305, 51 USPQ2d 1161, 1165-66 (Fed. Cir. 1999).

Moreover, because Swallow and Jarosz, taken alone or in combination, fail to teach or suggest all of the elements of claim 1, the Applicant request that Examiner

withdraw his rejections of claim 1. Swallow arguably discloses “a network . . . including a transmit endpoint . . . , a receive endpoint . . . and [four] intermediate nodes [connected between the transmit endpoint and the receive endpoint].” Swallow, col. 3, lines 9-14; FIG. 1. As shown in FIG. 1 of Swallow, the network of Swallow differs from “a network connecting a first gateway and a second gateway, the first gateway comprising a first node and a third node, the second gateway comprising a second node and a fourth node,” as recited in independent claim 1. In fact, nowhere does Swallow even teach or suggest a gateway comprising at least two nodes. Neither the endpoint nor the intermediate node of Swallow corresponds to a gateway comprising at least two nodes because neither the endpoint nor the intermediate node of Swallow comprises at least two nodes. In addition, Swallow does not teach any grouping of the endpoints and/or intermediate nodes to even suggest an entity comprising at least two intermediate nodes.

Because of this absence of a gateway comprising at least two nodes, the Examiner correctly observed that Swallow does not “teach transmitting over a network an indication from a first node [of a first gateway] to a second node [of a second gateway] that a third node [of the first gateway] has failed.” Office Action at 6. In fact, Swallow fails to teach or suggest transmitting any indication between nodes that a node has failed. Swallow teaches that if an intermediate node A “discovers that it cannot forward data packets to intermediate node B 106 (FIG. 10) because of a communication link failure” then intermediate node A “establishes a bypass tunnel 128 through intermediate node_D 120 to intermediate node_C 108 using the same method for

establishing the primary tunnel 126” as used for intermediate node B. Col. 8, lines 4-21 (emphasis added). Therefore, intermediate node A merely forwards the data packet to node D the same way as it would have to node B, without transmitting any indication of a communication link failure, as recited in claim 1.

Further, as Swallow does not teach or suggest a gateway comprising at least two nodes, Swallow also fails to teach or suggest “reconfiguring a first data, the first data initially configured to be transmitted over the network between the second node [of the second gateway] and the third node [of the first gateway], to be transmitted over the network between the fourth node [of the second gateway] and the first node [of the first gateway] after the indication has been received by the second node,” as recited in independent claim 1.

Jaros fails to cure these deficiencies of Swallow, nor did the Examiner cite Jaros as describing these features. Instead, Jaros discloses transmitting a heartbeat packet, which is merely a failure detection signal. Jaros, col. 3, lines 52-64. Transmission of a heartbeat packet, by itself, does not indicate that a node has failed. Id. Only when a node fails to respond to a heartbeat signal within a predetermined time is the failure of the node is detected. Id. Because no response signal indicates the failure of the node, there is no transmission of an indication of failure in the system of Jaros. Id. Thus, Jaros fails to teach or suggest “transmitting over a network an indication that . . . [a] node has failed,” as recited in independent claim 1.

In addition, even assuming *arguendo* that a heartbeat packet constitutes an indication that a node has failed, which Applicant disputes, Jaros discloses transmitting

a heartbeat packet from a client to a gateway in a client-gateway connection. Jarosz, col. 3, lines 52-64. Nowhere does Jarosz teach or suggest transmitting a heartbeat packet from a node of one gateway to a node of another gateway. Thus, even under the assumption, Jarosz fails to teach or suggest “transmitting over [a] network an indication from [a] first node [of a first gateway] to [a] second node [of a second gateway] that [a] third node [of the first gateway] has failed,” as recited in independent claim 1.

In view of the mischaracterization of the Swallow and Jarosz references noted above, the Examiner has neither properly determined the scope and content of the prior art nor properly ascertained the differences between the prior art and the invention of claim 1. Moreover, there is no motivation for one of ordinary skill in the art to modify the teachings of the references to achieve the claimed combinations. Thus, the Examiner has failed to clearly articulate a reason why claim 1 would have been obvious to one of ordinary skill in the art in view of the prior art. Accordingly, a *prima facie* case of obviousness has not been established with respect to claims 1 and the rejection under 35 U.S.C. § 103(a) must be withdrawn.

Independent claims 14 and 27, although of different scope, recite features that are similar to the features recited in independent claim 1. For reasons at least similar to the reasons set forth above with respect to independent claim 1, a *prima facie* case of obviousness has not been established with respect to independent claims 14 and 27. Accordingly, Applicant respectfully requests reconsideration and withdrawal of the § 103(a) rejection of independent claims 14 and 27 based on Swallow and Jarosz.

Dependent claims 2-9, 12, 13, 15-22, 25, 26, 28-35, 38, and 39 are allowable at least by virtue of their dependence from an allowable independent claim. Accordingly, Applicant respectfully requests reconsideration and withdrawal of the § 103(a) rejection of dependent claims 2-9, 12, 13, 15-22, 25, 26, 28-35, 38, and 39 based on Swallow and Jarosz.

In addition to the reasons already discussed, Swallow and Jarosz, taken alone or in combination, further fail to teach or suggest all of the features of dependent claims 5, 9, 18, 22, 31, and 35, including “wherein the security protocol comprises at least one of Secured Socket Layer (SSL), Secure HTTP (SHTTP), Private Communications Technology (PCT), and IP Security (IPSEC).” Swallow does not teach this feature, nor did the Examiner cite Swallow as describing this feature. Further, nowhere within Jarosz, including within the passage cited to by the Examiner in support of this rejection, does Jarosz teach or suggest any of the listed security protocol.

Similarly, Swallow and Jarosz, taken alone or in combination, further fail to teach or suggest all of the features of dependent claims 12, 25, and 38, including: “wherein transmitting over the network the indication further comprising using Internet Key Exchange (IKE).” Swallow does not teach this feature, nor did the Examiner cite Swallow as describing this feature. Further, nowhere within Jarosz, including within the passage cited to by the Examiner in support of this rejection, does Jarosz teach or suggest “using Internet Key Exchange (IKE)” as required by these claims. Accordingly, Applicant respectfully requests reconsideration and withdrawal of the § 103 rejection of dependent claims 5, 18, and 31.

In view of these mischaracterizations of the Swallow and Jaros references, the Examiner has neither properly determined the scope and content of the prior art nor properly ascertained the differences between the prior art and the invention of claims 5, 9, 12, 18, 22, 25, 31, 35, and 38. Moreover, there is no motivation for one of ordinary skill in the art to modify the teachings of the references to achieve the claimed combinations. Thus, the Examiner has failed to clearly articulate a reason why claims 5, 9, 12, 18, 22, 25, 31, 35, and 38 would have been obvious to one of ordinary skill in the art in view of the prior art. Accordingly, a *prima facie* case of obviousness has not been established with respect to claims 5, 9, 12, 18, 22, 25, 31, 35, and 38 and the rejection under 35 U.S.C. § 103(a) must be withdrawn.

IV. Conclusion

Applicant respectfully requests that this Amendment under 37 C.F.R. § 1.116 be entered by the Examiner, placing pending claims 1-9, 12-22, 25-35, 38, and 39 in condition for allowance. Therefore, this Amendment should allow for immediate action by the Examiner.

Furthermore, Applicant respectfully points out that the final action by the Examiner presented some new arguments as to the application of the art against Applicant's invention. It is respectfully submitted that the entering of the Amendment would allow the Applicant to reply to the final rejections and place the application in condition for allowance.

In view of the foregoing remarks, Applicant submits that this claimed invention is neither anticipated nor rendered obvious in view of the prior art references cited against

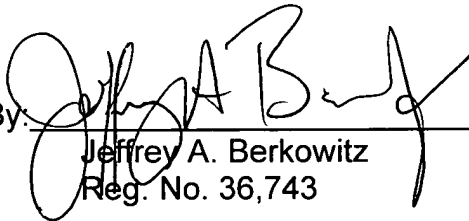
this application. Applicant therefore requests the entry of this Amendment, the Examiner's reconsideration and reexamination of the application, and the timely allowance of the pending claims.

Please grant any extensions of time required to enter this response and charge any additional required fees to Deposit Account 06-0916.

Respectfully submitted,

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